No. 13,562

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

FRANK LUEHR, and JONES STEVEDORING COMPANY, a corporation,
Appellees.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE JONES STEVEDORING COMPANY.

JOHN H. BLACK,
EDWARD R. KAY,
233 Sansome Street, San Francisco 4, California,
Attorneys for Appellee Jones Stevedoring Company.

FILED
MAY 15 1953
PAUL P. O'BRIEN
CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Statement of pleadings and jurisdiction	1
Statement of the case	2
Questions presented	6
Summary of the argument	6
The argument	8
I. The sole proximate cause of the accident was the confessed negligence of the Government's employee in tripping the release lever of the crane without warning, thereby causing the plane to drop upon and injure appellee Luehr, and there was no fault on the part of Luehr or appellee Jones	8
(a) It was necessary and proper that Luehr be in the position he was and doing the work he was doing when the plane was negligently dropped upon him by the Government's employee	8
(b) The accident was neither caused nor in any degree contributed to by the violation of any safety rule on the part of either appellee	20
(c) The Safety Rules referred to by the Government concerning ''sling loads'' are not in fact applicable to operations involving the loading of planes	25
II. The alleged violation of Safety Rules by appellee Jones would in no event constitute negligence per se but whether there was any negligence would simply be a question of fact which the trial court in this case determined adversely as to appellant	29
III. The Government's failure to call its employee and key witness who had charge of the Crane operations raises a presumption that his testimony would be unfavorable	32
IV. The trial court's findings of fact and conclusions of law are supported by a preponderance of the evidence and should not be disturbed	34

Page

V. A trial de novo is not available to the appellant since all of the evidence relating to the question of the alleged negligence of appellee Jones was given by oral testimony of witnesses in court 37

VI. The Government's authorities on the question of the alleged negligence of the appellee Jones are distinguishable in that the facts here establish without question that the accident was caused solely and proximately by the negligence of the Government 41

Conclusion 49

Table of Authorities Cited

Cases

Pages

Barbarino v. Stanhope S. S. Co. (C.A. 2d 1945), 151 F. (2d) 553 ....45, 46
Barrett v. City of New York, 1947 A.M.C. 1134.......... 34
Bornhurst v. United States, 1948 A.M.C. 53 (C.C.A. 9th).. 40

Catalina-Arbutus, 95 F. (2d) 283 38
City of Cleveland v. McIver, 109 F. (2d) 69............ 39
City of New York v. National Bulk Carriers, Inc., 138 F. (2d) 826 38
Commercial Molasses Corp. v. New York Tank B. Corp., 114 F. (2d) 248 39

Heranger, 101 F. (2d) 953 (9 C.C.A.) 39

Kulukundis v. Strand, No. 13,229, decided March 10, 1953 40

Larsson v. Coastwise Line (9 C.C.A. 1950), 181 F. (2d) 6 42

McKenney v. United States (D.C.N.D. Cal. S.D. 1951), 99 F. Supp. 121 44

Pan Am. Petroleum Co. v. Robins Dry Dock & R. Co. (2d Cir., 1922), 281 Fed. 97 47
Porello v. United States (C.A. 2nd Cir., 1946), 153 F. (2d) 605 41
Powell v. Pacific Electric Railway Co., 35 C. (2d) 40, 216 P. (2d) 448 29

Shields v. United States, 175 F. (2d) 743, cert. den. 338 U.S. 899 43
Simon v. City and County of San Francisco, 79 Cal. App. (2d) 590 31
Stetson v. United States, 1946 A.M.C. 900, 155 F. (2d) 359 (C.C.A. 9th) 40

Tawada v. United States, 162 F. (2d) 615.............. 39
The Georgetown, 135 Fed. 854 33
The M. E. Luckenbach, 174 Fed. 265 33

Pages

The Prudence, 191 Fed. 993 33
The S.C.L. No. 9, 114 F. (2d) 964 39

Uzich v. E. & G. Brooke Iron Co. (D.C.E.D. Pa. 1947), 76 F. Supp. 788 44

Statutes

Longshoremen's and Harbor Workers' Compensation Act, 33 USC 901-950 2

Public Vessels Act of 1925, 46 USC 781, et seq. 1

Pacific Coast Marine Safety Code:
- Rule 901 .... 20, 25, 26
- Rule 911 .... 21, 23, 25, 27

Texts

65 C.J.S., Section 122, page 732 43

No. 13,562

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,* vs. FRANK LUEHR, and JONES STEVEDORING COMPANY, a corporation, *Appellees.*	

On Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE JONES STEVEDORING COMPANY.

STATEMENT OF PLEADINGS AND JURISDICTION.

This appeal in Admiralty by the United States of America (hereinafter referred to as "the Government") concerns a final decree (R 72) entered on April 10, 1952 against the Government and in favor of the appellee Frank Luehr, and from a final decree (R 70) entered on April 11, 1952 dismissing appellee Jones Stevedoring Company (hereinafter called "Jones").

By way of an amended libel (R 3) under the Public Vessels Act of 1925 (46 USC 781, et seq.) the ap-

pellee Luehr charged the Government with liability for injuries suffered by him while he was employed as a longshoreman by Jones, aboard the USNS "SHAWNEE TRAIL", a public vessel owned and operated by the Government, as the result of the conceded negligence of an employee of the Government. The Government by way of a petition (R 13) under Admiralty Rule 56 sought recovery-over against Jones, who by answer (R 18) denied all liability to the Government and all liability to Luehr excepting that which it had assumed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 901-950. Jones in its answer also alleged that the United States District Court was without jurisdiction to entertain the said petition or to assess any liability against Jones.

STATEMENT OF THE CASE.

Inasmuch as the Government in its Statement of the Case has set forth a highly selected version of the evidence and has omitted significant facts based on the overwhelming evidence presented at the trial before the District Court, it becomes necessary on the part of appellee Jones to submit this statement of the case.

On July 28, 1950 appellee Frank Luehr was employed by Jones Stevedoring Company as a longshoreman, together with other stevedores, to assist in loading certain jet plane fuselages from an Army barge, which was owned, operated, managed and controlled

by the Government, to what is called the mechano deck, a superstructure built of adjustable steel I-beams above the main deck of the USNS "SHAWNEE TRAIL", a Navy tanker built and owned by, and operated for the Government. The planes were being transferred from the barge to the "SHAWNEE TRAIL" by the use of a large floating crane, or what is commonly referred to as a heavy lift barge, which was tied between the "SHAWNEE TRAIL" and the Army barge. The said heavy lift barge was likewise owned, operated, managed and controlled by the Government. Said vessels at the time of accident were docked at "Naval-In-Transit Dock No. 3" in navigable waters at Alameda, California.

The operation of picking up the plane from the Army barge by use of the derrick or crane of the heavy lift barge was directed exclusively by the "whistleman", an employee of the Government, who was in charge of the said heavy lift barge. The only thing the stevedores did in this connection was to affix the bridle to the plane and secure so-called "tag lines" to the fuselage for the purpose of steadying it while it was being moved high over the deck superstructure of the vessel. Neither Luehr nor any other employee of Jones had anything whatsoever to do in the moving of the plane from the barge to the vessel (R 97).

The crane operator, a Government employee, operated the controls of the crane and took orders only from his foreman, the whistleman, another Government employee (R 98).

At the time of the accident, about 11:30 A.M. after about eleven other planes had been so moved (R 215), a plane had been lifted from the barge and had been carried over to the mechano deck of the "SHAWNEE TRAIL" by employees of the Government as described above. The plane at that time was in a position *approximately* over the point at which it was to be stowed and secured on the mechano deck. It had been lowered by the crane to a position within reach of the stevedores, 2-3 feet from the final place of rest on the mechano deck (R 218-219). The plane was spotted in accordance with a loading plan previously prepared by Mr. Rosenstock, the Government's representative in charge of the operation, who was present on the catwalk adjacent to the mechano deck (R 108).

The customary method of doing this work and the means by which it was performed before and at the time of the accident was as follows: After the plane has been moved and lowered by Government employees to the *approximate* position where it was to be secured to the mechano deck, adjustable beams of the mechano deck are moved when necessary into *exact* position in order that wooden platforms can be placed as required for the purpose of securing the landing struts of the plane on the *precise* spot directed by the Government's representative.

The tag lines are used only while the plane is being moved high over the superstructure. When it is lowered down to *approximately* where it is to be landed and is within reach of the men, the tag lines are of

no more use and are let go (R 113). The men then take hold of the landing gear with their hands to keep and maintain control of the plane until it is actually landed in the *exact* position over and upon the three platforms (R 113-114).

At the moment of the accident Luehr was necessarily and properly holding the left rear strut stand, or landing gear, of the plane for the purpose of steadying and guiding it into the exact position on the platform (R 625-626). Rosenstock, the Government's representative in charge of the operation, and Spirz, Jones' foreman, decided it was necessary to move the plane "a little aft". Luehr at that point, and in the process of helping to steady and preparing to guide the plane into its proper position was then and there where his job required him to be and he was doing exactly what was necessitated by his particular duties (R 114-115). It was at this moment that the crane operator (Government employee) negligently caught his sleeve onto a lever control which suddenly and without warning caused the plane to drop and severely injure Luehr (R 115-116). The crane operator shortly after this accident admitted that he had made a mistake and that the accident was his fault (R 119).

The stevedoring contract, the basis upon which the Government claims recoupment from Jones (Government's Exhibit B) simply provides that Jones shall be liable-over to the Government only if the injury was occasioned in whole or in part by the negligence of Jones. But this provision is specifically

limited by the stipulation that Jones "shall not be responsible to the Government for and does not agree to hold the Government harmless if the damage, injury or death resulted solely from an act or omission of the Government or its employees or resulted solely from proper compliance by officers, agents or employees" of Jones with specific directions of the Government representative (Art. 14(b)(2) of Government's Exhibit B).

QUESTIONS PRESENTED.

(1) Should this Court properly grant a trial *de novo* so as to reconsider the overwhelming evidence against the Government's contentions?

(2) Where all the substantial and heavily preponderant evidence has established that the accident was solely and proximately caused by the negligent act of an employee of the Government, can the Court grant recoupment against a third party whose employee was injured while properly performing work at the precise place and in the exact manner that was required by the nature of the job and his calling?

SUMMARY OF THE ARGUMENT.

(1) The sole proximate cause of the accident was the admitted negligence of the crane operator, an employee of the Government, in causing the plane suddenly and without warning to drop and injure Luehr

as he was attempting to steady and guide the plane into position.

(2) There was no negligence whatsoever on the part of Jones or its employees proximately causing, or in any degree contributing, to the happening of the accident; Luehr was in a proper position and doing precisely what his job required him to do when the plane was caused by the negligence of the Government's employee to suddenly and without warning drop upon and injure him.

(3) The findings of fact and conclusions of law are fully supported by substantial and overwhelming evidence and should not be disturbed on appeal.

(4) The Government's appeal from the trial Court's decrees is nothing more than an obvious attempt to have the case heard *de novo.* Since 24 of 25 witnesses gave oral testimony in Court and inasmuch as the determination of the case turned solely on issues of fact, not law, the trial Court's decision, which is fully supported by substantial evidence, should not be reviewed.

(5) The stevedoring contract plainly provides that Jones shall not be liable to the Government for loss or damage resulting solely from an act or omission of the Government or its employees, which is the certain fact so conclusively established by the evidence in this case.

THE ARGUMENT.

I.

THE SOLE PROXIMATE CAUSE OF THE ACCIDENT WAS THE CONFESSED NEGLIGENCE OF THE GOVERNMENT'S EMPLOYEE IN TRIPPING THE RELEASE LEVER OF THE CRANE WITHOUT WARNING, THEREBY CAUSING THE PLANE TO DROP UPON AND INJURE APPELLEE LUEHR, AND THERE WAS NO FAULT ON THE PART OF LUEHR OR APPELLEE JONES.

(a) It was necessary and proper that Luehr be in the position he was and doing the work he was doing when the plane was negligently dropped upon him by the Government's employee.

It is conceded by all parties that the crane operator Cecil Bailey, who was an employee of the Government, carelessly and negligently tripped the release lever of the crane causing the plane suddenly and without warning to drop "as though the line was cut" (R. 341), thusly causing severe injuries to Luehr. Bailey's testimony by way of deposition (and he was the only witness whose testimony was not given in open Court) clearly establishes that the accident was caused by his negligence.

Bailey said:

> "* * * I pulled the friction in in order to hold the load and as I proceeded to boom down I looked out the window to get a better look to see that the boom was away from the gear, that is, the ship's gear, the stays and what have you; and as I reached out the window, I had a pair of coveralls—I was working down below oiling the engines—and the sleeve of the coverall caught on the friction and I pulled the friction forward; and as it done that, the plane dropped the distance of two and a half to three feet. * * *" (R. 219).

The Government argues in its brief (p. 15) that there were "two primary reasons for the injury to Mr. Luehr: (1) The plane fell, and (2) Mr. Luehr was under the plane". And, that: "In the absence of either of these factors, there would have been no injury to Mr. Luehr". The same simple observation can be made as to every accident arising from negligence in which someone is injured: a negligent act or omission and the presence of the injured person.

It is conceded by the Government in its curious theory that "the first cause is attributable to the negligence of the derrick operator" but that "the question then remains as to whether or not Mr. Luehr's presence under the plane involved negligence on his part, or on the part of any other employee of Jones" (Gov't Brief p. 15).

Simplified, the Government's whole argument hinges upon the question of whether or not Luehr was properly where he should have been, doing what he should have been doing in accordance with the requirements of his job at the time the plane was caused to fall upon him by the admitted negligence of the Government's employee.

The evidence presented to the Trial Court is so preponderately and convincingly against the Government's contention that we are constrained to doubt that anyone could reasonably expect an Appellate Court to give serious consideration to such a tenuous argument.

At the time of the accident Mr. Spirz was the walking boss in charge of Luehr and the other long-

shoremen employed by Jones. He was examined and cross-examined at great length; and we say without fear of contradiction that he was a most intelligent, truthful and impressive witness. He described how his men necessarily assisted by means of "tag lines" in helping to steady the plane from swinging and to prevent it from hitting any of the ship's superstructure or gear while it was being taken across the deck of the ship high above, some 35 or 40 feet. In this operation the whistleman in charge of the crane operator (both being Government employees), would then give a signal to the crane operator to lower the plane down to the point where it would be within reach of the stevedores, at which time the tag lines would be of no further use and would be dispensed with. Upon discarding the tag lines, it would become necessary for the men to take hold of the plane by hand for the purpose of steadying it to prevent damage to the plane (R 107-113-340-341). The Government's loading representative who was in charge of the job (R 172) directed the spot where the plane was to be landed according to a plan previously prepared by him (R 108-109). Wooden platforms were placed under the stands or tripods affixed to the landing gear (the wheels of the plane having previously been removed). Mr. Spirz's testimony describes graphically the manner in which this was accomplished.

> "Q. Could you describe to the Judge just what you do with them (loading platforms).
>
> A. Well, you should have three, because you have three landing wheels, have one for the nose, up in here (indicating) there is a beam that is

stationary that stays here and one stays here (indicating).

Q. Then that would be parallel to the catwalk?

A. Fore and aft. That is for the nose and wheel stand, we have one there and then we have two others for the rear two wheels, and on Mr. Rosenstock's plan he gives an idea just where those wheels will be.

The Court. Those are adjustable? Are they adjustable or when are they put on there?

The Witness. I don't understand.

Q. (By Mr. Resner.) The Court says when are they put on?

The Court. When you are lowering the plane?

The Witness. The stand on the—no, these platforms are put on these movable beams.

The Court. Yes.

The Witness. And when the plane is in the right place.

The Court. Yes.

The Witness. Then if the stand of the wheel is here we move the platform over.

The Court. They are adjustable?

The Witness. Yes, they are just a regular stand two men can handle.

The Court. All right.

The Witness. You can move it back and forth.

Q. (By Mr. Resner.) And all the beams also adjustable so that they are moved to receive the planes in the proper place?

A. Oh, yes, just like this shows, that is just how they are. You can move them back and forth, but if you kick one harder than the other you have to straighten it out, and they are movable. Now, the object is, you have to try and

get as close as you can before the plane comes aboard the ship where this platform should be. *So we get the plane where we can handle it and we move it to where we want it.* Then everything stops and we see where our platforms are. *If they aren't right we get under the plane and we have to move these movable beams just right—we have to put this platform exactly under that stand of the wheel.* We have to be careful because we have to drill a hole on this, outside of the beam, and another one on the inside, and on this side also, so after the plane is landed we have a carpenter come alongside that will drill a hole and put a U-bolt." (R 109-111.) (Emphasis supplied.)

Mr. Spirz testified further as follows:

"Q. And there are certain men required to to work on the mechano structure?

A. No, it is not necessary for certain men, it is just wherever they are at. If a man is on the mechano deck and the plane is being hoisted, he automatically will stop what he is doing and come over and be ready for the airplane.

Q. What I had in mind, does this operation entail some men working on the deck and some men up on top of the structure?

A. That is correct.

Q. What is the job of the men on top of structure, that is, on the beams?

A. Their job is to take care of the tag lines, if they have any tag lines when the plane gets within reach and it is stopped, their job is to hold on to the plane to keep it from swinging, moving, just to steady it." (R 112.)

*   *   *   *   *   *   *

"The Witness. Yes. And we have to keep those lines, tag lines, taut so the plane doesn't swing into anything.

Q. Are those tag lines also used when the plane is brought down when he gets above the spot where you are going to land it?

A. They are then of no more use.

Q. You do use it for awhile and the plane comes down?

A. While it comes down until the plane is within reach.

Q. When the plane is within reach, then what happens?

A. Then the tag lines are forgotten, either the men will go to the wheel and he will take the tag line off and just let it go, and hang onto the wheel structure.

Q. Now, does this operation require the men to get their hands upon the plane physically?

A. When the plane is down close to the mechano deck and they can reach the landing gear, then that is what they do, they go over and grab ahold of the landing gear to keep control of the plane.

Q. And they do that for what purpose, Mr. Spirz?

A. So the plane will not swing and hit anything.

Q. And so that you can land it——

A. You have to hold on to it to land it exactly on this platform.

Q. On the platforms?

A. Yes, sir.

Q. Now, is the plane stopped at some point before the men take over with their hands?

A. Well, it is up 30 feet, the operator might stop it three or four times, or he might have it come all the way down until it is up to us to grab hold of it.

Q. And then is it stopped at that point before the men grab hold of it?

A. Oh, yes.

Q. Now, did you see Mr. Luehr right before this accident?

A. Well, yes, when I was standing here (indicating).

Q. You said here, on the catwalk, you have indicated on the catwalk?

A. Yes, and the plane was coming over, all tag lines were taken care of, I looked inshore when I saw Mr. Luehr standing over here by the stays, and we waited for the plane to come down, and *when the plane stopped and we were ready to take over and hold onto it,* I saw Mr. Luehr coming over and grab hold of that, the left rear landing strut stand, I presume that is what it was, that is where he was.

Q. *Was he in a place where he was supposed to be, Mr. Spirz?*

A. *Yes.*

Q. *That was his job there?*

A. *That is his job, to hold onto the plane and steady it.*

Q. Was he doing what he was required to do at that particular time?

A. That is correct." (R 113-115.) (Emphasis supplied.)

The Government's own witness Mr. Lehmkuhl admitted that at some point in the operation it is neces-

sary for the men to physically take hold of the airplane to bring it to its final resting place:

> "Q. After it gets to that point, a man certainly gets up to the tripod to see it is landed exactly where it is supposed to be, is that right?
>
> A. After it is to within practically the permanent setting place of the airplane, yes, sir.
>
> Q. And he is right there on the platform, is that right?
>
> A. When the tripod is centered on the platform and in its *approximate* final resting place, the people go in and steady it by actually physically taking hold of the airplane.
>
> The Court. At that time is he physically under the plane?
>
> A. Yes." (R 596.) (Emphasis supplied.)

Counsel for the Government further contends that all Luehr needed to do was to stand back from the plane and hold onto the wing, that it was not necessary to take hold of the tripod underneath the wing. The following testimony by Spirz completely destroyed that contention:

> "Q. (By counsel for the Govt.) At this particular moment when the plane dropped he (Luehr) was steadying the plane?
>
> A. That is correct. He was standing on a ten inch beam and he had his hands on the tripod steadying the plane.
>
> Q. On the tripod of the plane?
>
> A. The landing gear, the stand, the tripod.
>
> Q. He was entirely under the wing of the plane?

A. Partially under that tripod, that landing gear is underneath the wing so far. That is why you are under the plane to steady that plane, *you have to get in there.* When you get in there and grab hold of your landing gear, the wing's above you, over you, you're underneath.

Mr. Resner. When the witness said so far, he indicated with his hands a distance of one and a half feet.

Q. (By Mr. Harrison.) *Is it not possible to steady the plane by putting the hands on the wing?*

A. *The wing is too high.*

Q. Is it not possible to lower the plane down lower?

A. Then you have your tripod and stand in between here, liable to damage your landing gear (indicating).

* * * * * * *

Q. And you say that the man standing there could not reach the wing that is only five feet above, the landing gear five feet?

A. *Yes, he could reach it, but he couldn't steady it. There is nothing to hold the plane, I mean."* (R 154-155.)

Mr. Harrison tried in vain to suggest that Luehr could have steadied the plane by holding onto the edge of the wing, but the testimony of Spirz and many other witnesses completely exploded such a claim:

"Q. That would be about shoulder height?

A. The leading-trailing edge of the wing?

Q. Yes.

A. It is a little higher than that, and *no place to grab. You can't—you can shove it, and there*

is a sharp point in the trailing edge, but you can't hold. If the plane wants to go that way, the wing won't do you any good, won't hold the plane. The tag lines are of no use when it gets down that far.

Q. Why not?

A. Because the tag lines are gone when you get, reach the object, and you see that tag line, you see that man over there, see what he is doing, you can see that man over there and they are working with the plane. The wing is swinging, the three men—you see what is happening, *but when the plane comes down there is no vision here, he can't see that man, he can see his feet, but you can't see what he is doing with the hands. That is why you discard your tag lines when the plane comes within reach and you can grab that stand on the landing gear. Then your tag line is of no more use to you."* (R 156.) (Emphasis supplied.)

Timothy O'Brien, who after World War II became Deputy Attorney General in the Attorney General's Office in Sacramento, testified that during the war he was assigned to the Pacific Overseas Air Service Command at Oakland, California and that in that capacity he handled all Air Force loadings for various destinations and that he had considerable experience in loading planes on mechano decks (R 663-664).

Mr. O'Brien's testimony regarding the customary and proper manner of loading planes on mechano decks corroborates the testimony of Spirz and the other witnesses:

"A. Now, the mechano deck had a certain problem in that we never had everything in exact

position as to—so that the platforms to which the airplane was being loaded would exactly coordinate with the part of the airplane we had to get on the platform, namely, your landing gear assemblies. When it came down to a certain point, generally it was high enough so you could walk in under the aircraft while working on these irons which makes up the mechano deck.

Then you would go underneath, line it up, and then bring it down. There were two reasons you had to go under, one was to line it up so they are square on the platform, and secondly, the tripods weren't perfectly balanced, so that if you didn't exactly set them in line as you dropped it onto the deck, the natural result it would come up with a little angle one way or the other. But that is substantially the procedure the stevedores did, they did go in under the aircraft, grabbed the landing gear guided her into the final position, and then dropped her on the deck, meaning onto the prepared platform, making sure the tripod was absolutely flat.

Q. Now let me ask you, Mr. O'Brien, assuming that the plane wasn't just over that platform, as you mentioned, you can't get them, just off, say it is off a foot or so off to the side of it, and it has been stopped by the whistleman at a height allowing the men to hold onto the plane, or the strut or gear, now, will you state whether or not in the course of that operation it would be necessary to have men to get hold of the plane at that point?

A. It would be, because *the aircraft was never allowed to swing free once it came in any area where it could come in contact with an obstruction; of course, the best thing to hang onto under*

> *those circumstances would be the struts and the other—well, that would be the only thing underneath you could have grabbed.*" (R 667-668.) (Emphasis supplied.)

There is no conflict in the record with respect to the fact that the plane had been lowered to within two to two and one-half or three feet from the level of the mechano deck at which point it was stopped. The Government's crane operator so testified (R 218-219). At that point the Government man in charge, Mr. Rosenstock, and Spirz agreed that the plane had to be moved over "a little bit aft toward the house" (R. 115).

It was Luehr's job to take hold of one of the struts or tripods and to steady the plane at this point so the plane wouldn't hit any part of the ship and to be prepared to help guide it into its final resting place on the deck (R 112, 130, 340, 518, 611, 612, 636, 651, 652, 667, 668).

This is precisely what Luehr was doing and was employed to do at the time of the accident. As Spirz testified: "There is no other way." (R 132).

Luehr himself testified that when he took hold of the strut the next succeeding step was to have helped guide it down to the platform. As stated above, the plane had to be moved aft only "a little bit":

> "Q. (By Mr. Kay) Mr. Luehr, after this plane came over and was put in this position where it was held still, at which time you went over there and took hold of the strut with your

left hand and a hold of the fuselage with your right hand, the next succeeding operation that you were going to do was to push that and have that go down and land on that platform that is on this mechano deck; is that correct?

A. That is correct." (R 349).

(b) The accident was neither caused nor in any degree contributed to by the violation of any safety rule on the part of either appellee.

The Government, in grasping at straws, urges the wholly unsupported claim that Luehr, at the time of the accident, was in a position in violation of two safety rules contained in the "Pacific Coast Marine Safety Code" (Government's Exhibit A). As will hereinafter be shown Rule 901 which prohibits the suspending of "sling loads" over the heads of workmen is not applicable to the loading of planes.

The Government also particularly relies on Rule 911 of that code, likewise not applicable for the same reason, which reads as follows:

> "When assisting to steady in hoisting or landing a *sling load,* longshoremen shall not stand in the line of travel of the load nor between the load and any nearby fixed object and shall always face the load. *Drafts should be lowered to shoulder height before longshoremen take hold of them for steadying or landing."* (Emphasis supplied).

As we shall hereinafter demonstrate, these two rules do not apply to the operation of loading an airplane onto a mechano deck. Nevertheless, reading the two rules in the light of what may be considered

in certain cases would be good practice, will this Honorable Court please note that Safety Rule 911, upon which the Government relies so heavily, specifically authorizes longshoremen "to take hold" of loads for "steadying or landing" when "lowered to shoulder height".

We have already conclusively proven that this load was stopped 2 to 3 feet above the mechano deck before Luehr approached it. Not even the Government can contend with any degree of sincerity that 2 or 3 feet is more than "shoulder height".

That Luehr was not under a suspended "sling load" nor "in the line of travel of the load, nor between the load and any nearby fixed object" is abundantly made clear by practically all of the testimony heard by the trial Court.

In this connection Spirz testified that while the plane is above reach of the men they are not to go under it. "Tag lines" are used at this point:

> "Q. Would you say it was proper to allow a man to stand under a suspended load ten feet above his head?
>
> A. No, because he couldn't control the airplane, he couldn't reach it. If he can reach, when he can reach the plane, then it is permissible to get under it.
>
> Q. Now, when it reaches the uppermost part of your reach, is it proper for him to stand underneath the load to help steady it?
>
> A. Well, he doesn't go underneath the load, then *when it gets within a reasonable reach, where he can go out and reach that landing gear*

> *or that tripod, then he has to go underneath that ring and he is partially under the plane. Yes, he has to do that.*" (R 124-125.) (Emphasis supplied.)

Mr. Spirz added that "* * * *you can't land that plane unless you get under it.*" (R 125).

All of the above testimony came out on cross-examination by Mr. Harrison, counsel for the Government. Mr. Harrison persisted in trying to establish that this was dangerous practice, which brought from the Court this logical observation:

> "The Court. He has outlined a situation here, the necessity, whether it is dangerous or not, in order to land the plane, get it in place, the man has to get under it, and that is dangerous." (R 126).

Mr. Spirz further explained that it was necessary for the men to hold the plane with their hands to "steady it from swinging" (R 130) and that "you have to get under it * * * there is no other way. You have to get underneath the plane to hold the tripod to land it." (R 132).

The trial Court had good reason to believe Spirz when he testified: "*I took all the safety precautionary measures that were possible at that time.*" (R 150.) (Emphasis supplied.)

That there was no violation of any safety rule as claimed by the Government was most effectively developed during the cross-examination of Mr. Spirz on this point in the following testimony:

"Q. Is it true, Mr. Spirz, that the Pacific Coast Marine Safety Code has some specific provision which requires men shall not stand underneath a suspended load?

A. There is a rule in that book that states that. And if you have—we will take an example, a load of canned goods or a sling load of sacked sugar or coffee, that load is only probably four feet wide at the most and five feet long, and the smallest hatch on a ship—the square of the hatch, like a Liberty No. 3 hatch is twenty feet—a square of twenty feet. A man can stand in the square of that hatch and not be under the load.

An airplane with a wing spread of 35 or 40 feet and with the landing gear underneath the wings and the tripod stand underneath the wings—three landing gears under the wing, the wing is above—that is not a proper place to hold onto an airplane. *The most logical place for any stevedore to hold onto an airplane is that landing gear, that tripod, and that is the lowest part of the airplane* * * *" (R 163.) (Emphasis supplied.)

And:

"A. *We can't get away from being under that plane. It is that low. A man holding to a sling load of canned goods or coffee, it isn't necessary. You don't have to.*" (R 164.) (Emphasis supplied.)

The complete answer to the Government's assertion that Luehr was in "the line of travel" or "between the load and any fixed object" allegedly contrary to Rule 911 of the Safety Code is that at the time of the accident the plane was to have been moved "a

little aft" and away from Mr. Luehr who was facing the load in exact compliance with the code.

> "Q. Which direction did you intend it to go? Which direction did you and Mr. Rosenstock want it to go?
>
> A. Aft and inshore.
>
> Q. Was that——
>
> A. (Interposing) I mean aft and offshore. That would be aft and towards the midships.
>
> Q. Was that toward Mr. Luehr or away from Mr. Luehr?
>
> A. That would be, where Mr. Luehr was standing, it *would be going away from him.*
>
> Q. *Away from Mr. Luehr?*
>
> A. *Yes."* (R 162-163.) (Emphasis supplied.)

As stated above, this very section of the Safety Code on which the Government curiously relies, even though it has no reference to loading planes, provides for and contemplates precisely what Luehr was doing insofar as he was "assisting to steady" the plane. The last sentence of the rule specifies: "Drafts should be lowered to shoulder height before longshoremen take hold of them for *"steadying* or landing".

We reiterate that the testimony conclusively shows that Luehr waited until the plane was stopped at a position "shoulder height" before he took hold of the tripod for the purpose of "steadying" and "landing" the plane.

Mr. Harrison, counsel for the Government, unwittingly, but aptly, expressed the true situation when he advised the Court: "* * * the only guiding neces-

sary at that time to get it over the platform is to stop it from swinging itself and *to guide it a little bit as it approaches the platform.*" (R 624.) (Emphasis supplied.)

While the Government has contended throughout the trial of the case that there was an exact point at which a man would be justified in physically holding onto the plane, the testimony of nearly every witness, as we have shown, was to the effect that Luehr was strictly in the position where the job required him to be and doing exactly the thing that his job required him to do at the time of his accident.

(c) The Safety Rules referred to by the Government concerning "sling loads" are not in fact applicable to operations involving the loading of planes.

It is our contention that Safety Rules 901 and 911 discussed above are not in fact applicable to the operation of loading a jet plane, in that it was never within the contemplation of the promulgators of the Safety Code that "sling loads" would have any reference to "heavy lifts" or loads such as a plane fuselage. Nonetheless, as have heretofore shown, the spirit of those particular rules was complied with.

Timothy O'Brien, previously referred to, testified in this connection as follows:

> "Q. I will ask you this, Mr. O'Brien: Is a plane load such as the plane here that would be coming down to the mechano deck, that is, that plane coming over, would you call that a sling load?

A. No, I had understood it was a lift load. To me a sling load contemplates a duckboard, pallet board, something of that sort, which is a different type of operation." (R 669.)

Safety expert Stanley C. Davis, who was the technical advisor when the rules were promulgated, testified as follows:

"Q. Can you tell us whether an airplane attached to a line can be lowered on a mechano deck is a sling load?

A. No, sir." (R 681.)

* * * * * * *

Q. "You have testified that you would not term a plane suspended on a cargo fall a sling load?

A. Yes, sir." (R 690-691.)

The testimony of Mr. Davis on the question of the proper interpretation of the Pacific Coast Maritime Safety Code is most significant in that Mr. Davis was the safety supervisor for the Maritime Association of the Pacific Coast for a period of over 22 years, having been with that organization since its inception. He was fully familiar with the operation of loading jet planes on mechano decks (R 679). Mr. Davis explained that "skeleton decks" as set forth in the Safety Code are entirely different from "mechano decks" and that the safety rules relied upon by the Government are not applicable to situations such as loading planes on mechano decks (R 679-684).

With respect to Rule 901 of the Safety Code which provides that a "sling load shall not be put or sus-

pended over the men's heads" and Rule 911 which has reference to "loading a sling load", Mr. Davis explained that these rules did not in fact apply to a situation involving the loading of planes upon mechano decks:

> "Q. Well, the point I am trying to make is this, Mr. Davis. The rule says, I will read only the pertinent part of it, Mr. Kay, the rule which I feel pertinent:
>
> > 'When assisting to steady in hoisting or landing a sling load, longshoremen shall not stand in the line of travel of the load nor between the load and any nearby fixed object,' and the load, I assume.
>
> Now, would you say that that portion of the rule would apply equally well to a lift?
>
> A. No, I wouldn't.
>
> Q. Why not?
>
> A. Because only lifts—it becomes necessary in various operations for the men to walk in and grasp that load in order to steer it and of course walk it into position where it is going to be landed.
>
> Q. Yes. Is it ever necessary for a man to walk—it says that, the remainder of the rule says:
>
> > 'Drafts should be lowered to shoulder height before longshoremen take hold of them for steadying or landing.'
>
> Now, is it your testimony that that rule does not apply to a lift?
>
> A. That would apply to a lift or anything, because they would naturally stay out from under it until it came to shoulder height, and when it

gets to shoulder height it becomes necessary for them to control the load.

Q. Now, isn't it true that the reason that they require it to come to shoulder height is so that the men can steady by putting their hands out directly in front of them?

A. Yes.

Q. The rule requires them to come down to shoulder height so the men won't have to reach under there and consequently be under it (indicating)?

A. May I say that rule pertains generally to the handling of loads in a hatch, and when you are loading cargo and a load will come in, and then the longshoremen in a hold will take the cargo from the board or scow and stow it in the ship and while they are doing that they may start to bring another load in, and that pertains to the fact that they shall stand clear of that load, and there is a rule there that calls for them to hold that load until men in the hold are ready for it, and they can get in the clear and not be in line of travel.

Q. I understand. And you say that the rule does not apply to deckloads at all?

A. Now, deckloads, you are giving that a lot of territory.

Q. You took in a lot of territory, you said the rule applied mainly to loading in the hold; does it apply to loading——

A. May I answer the question this way: That the men will stand clear until the whistleman has landed or spotted that load *as near as possible over the point where he intends to land it permanently.*

Q. I see.

A. *Then it becomes necessary for the men to go under or near that lift.*" (R 691-693.) (Emphasis supplied.)

II.

THE ALLEGED VIOLATION OF SAFETY RULES BY APPELLEE JONES WOULD IN NO EVENT CONSTITUTE NEGLIGENCE PER SE BUT WHETHER THERE WAS ANY NEGLIGENCE WOULD SIMPLY BE A QUESTION OF FACT WHICH THE TRIAL COURT IN THIS CASE DETERMINED ADVERSELY AS TO APPELLANT.

A recent case involving this specific point was decided by the California Supreme Court on April 4, 1950 in the matter of *Powell v. Pacific Electric Railway Co.* (35 C. 2d 40, 216 P. 2d 448). Defendant's motorman had violated a company operating rule which required that motormen reduce their speed a sufficient distance in advance of a highway crossing so that the train would be allowed to coast on its approach "to enable full braking power being obtained in emergencies". Upon appeal from a judgment in favor of the defendant, the Court held:

> "Clearly it was for the jury to determine as *a question of fact* whether the motorman acted as a man of ordinary prudence under the circumstances in the operation of his train when he first saw the truck on the right of way and assumed its probable procedure. (Peri v. Los Angeles Junction Ry. Co., supra, 22 Cal. 2d 111, 120, and cases there cited.)

> "Nor does respondent's above-noted operating rule avail appellants in establishing their right to recover because of the happening of the fatal accident." (Page 46.) (Emphasis supplied.)

The Court went on to hold that the rules were properly admitted in evidence "as bearing on the standard of care respondent thought appropriate to insure the safety of others at its track crossings" (Page 46). It was pointed out, however, that this would be a circumstance for the jury to consider on the issue of respondent's negligence, but that clearly *"a violation of such rule would not constitute negligence per se"* (Page 46.) (Emphasis supplied.)

The jury had been instructed that as to the legal effect of the company's rule

> "* * * that while 'not the law', a 'breach of duty' might be implied from a finding of violation of the rule. Neither was it 'misleading' nor did it effect a conflict for the court to give the further charge that the motorman would not be guilty of negligence in the operation of the train if the jury found that he 'used the same degree of care that any prudent person would have used under the same or similar circumstances.' Since respondent's rule was 'not the law' but only a factor to be considered in the jury's evaluation of the motorman's conduct as a factual issue (*Simon v. City and County of San Francisco,* 79 Cal. App. 2d 590, 598), the standard of care that he was bound to exercise remained 'that of the man of ordinary prudence under the circumstances.' (Peri v. Los Angeles Junction Ry. Co., supra, 22 Cal. 2d 111, 120.)"

In *Simon v. City and County of San Francisco,* 79 Cal. App. (2d) 590, 598, the Court clearly stated the law to be that while company safety rules were admissible "it was a question of fact for the jury and not a question of law for the court to determine whether the conduct of the motorman, under the circumstances, constituted negligence".

As the District Court in the case at bar so aptly observed, the question of the application of the safety rules to the facts and whether or not there was any question of negligence was a matter for the Court to determine from the facts presented:

> "The Court. Well, to say that you may or may not get under a load under certain conditions, you will have to be guided by the facts and the testimony from this record. Under the conditions existing I can see how he can get under this plane and get under these others——
>
> Mr. Harrison. Well, if your Honor please——
>
> The Court. I think you are entitled to read the rules if they have any application; I will have to make the determination on the facts proved." (R 578-579.)

The trial Court, upon hearing the many witnesses presented and after carefully evaluating their testimony, determined that there was no violation of any safety rules and that there was no negligence on the part of appellee Jones or any of its employees.

III.

THE GOVERNMENT'S FAILURE TO CALL ITS EMPLOYEE AND KEY WITNESS WHO HAD CHARGE OF THE CRANE OPERATIONS RAISES A PRESUMPTION THAT HIS TESTIMONY WOULD BE UNFAVORABLE.

A most significant development took place during the trial of this case when counsel for the Government at first indicated he would be agreeable to submitting both the deposition of Bailey, the crane operator, and Cates, the Government employee in charge of the crane operations "in the record" (R 196):

> "Mr. Resner. May I ask if there is a deposition available for Cecil Bailey and Charles Cates?
> tion available for Cecil Bailey and Charles Cates?"
>
> *   *   *   *   *   *   *
>
> "Mr. Harrison. We might suggest for the record that we don't feel there is any necessity for reading the depositions. Of course the libelant is entitled to do so, but *we would be agreeable to just submitting the depositions in the record.*
>
> The Court. You don't know my practice here. I want it to register now as we go along. It may be of assistance to me in the matter. I will have to read them if you gentlemen don't, so I will give you the burden of reading them.
>
> Mr. Resner. If your Honor please, I might tell you that on June 29, 1951—last year—we took the deposition of these two men, Cecil Bailey and Charles Cates. Cecil Bailey was the man who was operating the crane which dropped the plane, and Charles Cates was the whistleman who stood on the catwalk and gave the signal. He is the man, Charley, Mr. Spirz referred to.

These men were both employees of the army at the time of the accident, and the appearances at that time were the same as the appearances in at Court before your Honor insofar as counsel are concerned * * *" (R 196-197.) (Emphasis supplied.)

Later when Mr. Harrison was asked about producing witness Cates, he stated as follows:

> "Mr. Resner. Let me ask you this: If we don't subpoena him, do you intend to call him?
> Mr. Harrison. I do not." (R 283).

There is an established principle of law that the failure of a party to call as a witness one of its employees raises a presumption that his testimony would be unfavorable to that party. See *The Prudence,* 191 Fed. 993, at 996, where the Court stated:

> "The failure of the Prudence, either to produce the mate who was in the pilot house at the time of the collision, or to account satisfactorily for not so doing, is a circumstance which the court cannot fail to observe in reaching its conclusion."

See also *The M. E. Luckenbach,* 174 Fed. 265, in which the Court held it was within the power of the respondent to produce evidence, and its failure to produce such evidence constituted a presumption against it on that issue.

In the case, *The Georgetown,* 135 Fed. 854, the Court held that where the evidence largely preponderates in favor of one side, the failure of the other to call members of the crew of its vessel who were in

a position to know the facts is a circumstance entitled to be considered against it.

In *Barrett v. City of New York,* 1947 A.M.C. 1134, the failure to produce the tug captain, an important witness created a presumption that he knew something that would have been damaging to his vessel's case.

Cates was a highly important witness. He was the whistleman in charge of the operations of the crane and he was present at the time of the accident. The failure of the Government to produce him can only be presumed, in the eyes of the law, to be due to the fact that his testimony would be highly unfavorable to the Government's theory of the case.

IV.

THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE AND SHOULD NOT BE DISTURBED.

The trial Court found that "* * * United States of America so negligently and carelessly managed, operated, maintained and controlled the aforesaid barge and floating crane BD 3031 that they did cause said jet airplane to fall from the hoist by which it was being loaded and it did fall upon the libelant causing him grievous and severe personal injuries as hereinafter found." (Finding of Fact No. VII, R 63).

It was further found that: "* * * it is true that said barge and floating crane BD 3031 was carelessly

and negligently operated and controlled by respondent United States of America and it is true that as a direct and proximate result of said negligence and carelessness a jet airplane was caused to and it did fall upon the libelant, crushing him and causing him grievous and severe personal injuries as hereinafter found." (Finding of Fact No. VIII, R 63).

The Court further found in Finding of Fact X that "* * * it is true that as a sole, direct and proximate result of the exclusive negligence and carelessness of respondent United States of America a jet airplane was caused to and did fall upon libelant and libelant thereby was caused to and did incur grievous and severe personal injuries * * *" (R 64).

With respect to the Government's petition impleading Jones Stevedoring Company, the trial Court found that "* * * respondent-impleaded, Jones Stevedoring Company, had no direction or control of the use or management or operation of said derrick barge." (Finding of Fact No. IV, R 54). Also that "* * * It is not true that any injuries sustained by the libelant were caused in whole and/or in part or at all by the carelessness and/or negligence of Jones Stevedoring Company in directing said libelant to stand under a swinging load in a precarious position several yards above the main deck of the vessel and/or in failing to provide and/or request any decking and/or scaffolding and/or other safety appliances for the use of said libelant. It is true that Jones Stevedoring Company did not direct libelant to stand

under a swinging load in a precarious position several yards above the deck of the vessel, and it is true that decking and/or scaffolding and/or other safety appliances were not required or necessary and that Jones Stevedoring Company was not required or under any duty to provide or request any of these appliances. It is not true that said injuries suffered by libelant, or any of them, were in any way caused in whole or in part by any act or negligence and/or carelessness upon the part of Jones Stevedoring Company, its employees, servants or agents, and it is true that all of the injuries suffered by libelant were caused solely and exclusively by the negligence of respondent United States of America." (Finding of Fact V, R 54, 55).

The Court further found that the Government was liable in damages to libelant under the amended libel but that such liability was neither in whole nor in part proximately, or at all, caused by or contributed to by the fault or negligence of Jones Stevedoring Company, but that said liability was exclusively that of the Government and that its exclusive negligence was the sole and proximate cause of the accident. It was further found that "It is not true that Jones Stevedoring Company is obligated under the contract or otherwise, or at all, to respond to the United States of America either by way of contribution or indemnity under said contract or otherwise, or at all, and this Court finds that there is no liability on the part of Jones Stevedoring Company under the terms of

said contract, or otherwise, or at all." (Finding of Fact No. VI, R 55-56).

The Court also found "That the issue of whether or not the Jones Stevedoring Company and/or Fireman's Fund Insurance Company must reimburse the United States for such portion of the liability herein founded on loss of earnings so far as compensable under the provisions of the Longshoremen's and Harbor Workers' Act and the contracts of insurance therein referred to, although argued and presented, is not properly determinable in this action." (Finding of Fact XII, R 58).

These findings of fact, both as to the Government's liability to Luehr and as to the claimed liability of Jones, and the corresponding conclusions of law are fully supported by a preponderance of the evidence submitted to the trial Court. Accordingly, none of the findings of fact or conclusions of law in either case are subject to being disturbed on appeal.

V.

A TRIAL DE NOVO IS NOT AVAILABLE TO THE APPELLANT SINCE ALL OF THE EVIDENCE RELATING TO THE QUESTION OF THE ALLEGED NEGLIGENCE OF APPELLEE JONES WAS GIVEN BY ORAL TESTIMONY OF WITNESSES IN COURT.

The only witness whose oral testimony was not heard in open Court was Cecil Bailey, the Government employee whose negligence admittedly caused the plane to drop upon and injure appellee Luehr.

His deposition was read into evidence. The oral testimony of the remaining 24 witnesses was heard and evaluated by the trial Court. All of the evidence as to the question of whether appellee Jones, or any of its employees, were guilty of negligence as charged by the Government was by way of oral testimony of these witnesses. The trial was lengthy and the witnesses were thoroughly examined and cross-examined by counsel for the respective parties as well as by the Court. As a consequence, the trial Court was able to evaluate fully the weight to be given the testimony of the various witnesses.

It is not believed that this Court should or will try this case *de novo.* The rule appears to be well settled that the trial Court is in a better position to judge the credibility and to give weight to the evidence when all the testimony is adduced from witnesses personally present.

In the case of *Catalina-Arbutus,* 95 Fed. (2d) 283, Judge Denman of this Court stated:

> "While this admiralty appeal is a trial de novo, the presumption in favor of the findings of the District Court is at its strongest, since the trial judge heard all the witnesses, save one, and his deposition clearly sustains those heard. Ernest H. Meyer (9 CCA), 1936 A.M.C. 1179, 84 Fed. (2d) 496, 501; Silver Line et al. v. United States, et al. (9 CCA), 1938 A.M.C. 521."

To the same effect is the case of the *City of New York v. National Bulk Carriers, Inc.,* 138 Fed. (2d) 826, wherein it was said:

"It appears to be impossible to convince the bar that we will disturb findings of fact as seldom in admiralty causes, as in any other. Whether there lingers a notion—never in fact justified—that because an appeal in the admiralty is a new trial, the scope of our review is broader, we cannot know; but over and over again appeals are taken without the least chance of success except by oversetting findings of fact upon disputed evidence. In order to meet this persistence we may in the end find ourselves forced to invoke the penalty provided in Rule 28 (2) of this Court."

To the same effect are many other cases, including:

Heranger, 101 Fed. (2d) 953 (9 C.C.A.);
City of Cleveland v. McIver, 109 Fed. (2d) 69;
Commercial Molasses Corp. v. New York Tank B. Corp., 114 Fed. (2d) 248;
The S.C.L. No. 9, 114 Fed. (2d) 964.

This Court in the case of *Tawada v. United States,* 162 F. (2d) 615, spoke as follows on this precise point:

"In an appeal in admiralty, where a substantial part of the evidence was heard in open court, the 'correct rule' is that the findings of the trial court 'are accompanied with a rebuttable presumption of correctness'. *Thomas v. Pacific SS Lines, Ltd.* 9 Cir. 84 F. (2d) 506, 507, 508; *The Pennsylvanian,* 9 Cir. 149 F. (2d) 478, 481. And 'where all of the evidence is heard by the trial judge and the question is one of credibility of witnesses on conflicting testimony, the presump-

tion (that the findings of the District Court are correct) has very great weight.' "

This Court succinctly stated the rule in *Stetson v. United States,* 1946 A.M.C. 900, 155 Fed. (2d) 359 (C.C.A. 9th) and in *Bornhurst v. United States,* 1948 A.M.C. 53 (C.C.A. 9th) as follows:

> "The findings are supported by substantial evidence, are not clearly erroneous, and hence should not be disturbed."

This Court in a most recent case, *Kulukundis v. Strand,* No. 13,229, decided on March 10, 1953, reiterated the long standing rule against retrying cases on appeal where factual issues have been resolved by the trial Court. The findings of the District Court on the question of negligence was challenged and this Court held in that respect as follows:

> "To the extent it is urged that the District Court resolved the factual issues against the weight of the evidence, we are limited in the scope of our review by the general rule, in admiralty proceedings, that *the findings are not to be disturbed where they are supported by substantial evidence and are not clearly erroneous."* (Emphasis supplied.) Citing the following authorities: *The Rocona v. Guy F. Atkinson Co.,* 173 F. (2d) 661 (9 Cir. 1949); *Fiamengo v. The San Francisco,* 172 F. (2d) 767 (9 Cir. 1949), Certiorari den. 337 U.S. 946; *Ford v. United Fruit Co.,* 171 F. (2d) 641 (9 Cir. 1948); *Heder v. United States,* 167 F. (2d) 899 (9 Cir. 1948).

A review of the record in the case at bar makes it clear beyond any reasonable question that the District Court's findings are fully supported by very substantial evidence. Indeed, the evidence is so overwhelming against the Government that it can truly be said that there is really no conflict at all.

The facts in relation to every material issue in the matter at bar were decided by the District Court in favor of appellees and against appellant. It is therefore respectfully submitted that a trial *de novo* is not available to the Government.

VI.

THE GOVERNMENT'S AUTHORITIES ON THE QUESTION OF THE ALLEGED NEGLIGENCE OF THE APPELLEE JONES ARE DISTINGUISHABLE IN THAT THE FACTS HERE ESTABLISH WITHOUT QUESTION THAT THE ACCIDENT WAS CAUSED SOLELY AND PROXIMATELY BY THE NEGLIGENCE OF THE GOVERNMENT.

The case of *Porello v. United States* (C.A. 2nd Cir. 1946), 153 F. (2d) 605, which is cited in support of the position taken by the Government that there can be more than one proximate cause of an accident is based on facts entirely different from those involved in the case at bar. The libelant in that case was injured by the falling of a strongback from a hatch into the lower hold. It was found from the evidence that libelant's employer was "at fault because its foreman negligently loaded the cargo in a manner which caused the strongback to be unshipped". (P.

606). In other words, the stevedoring company in that case was held liable-over to the Government as the owner of the vessel because of the specific negligence of the foreman in allowing the strongback to be unseated during the loading operations. The Court further found that "the raising of the vehicle unseated the strongback, causing it and a number of the hatch cover planks to fall into the hold and hit the libellant. Di Mare, the foreman, knew that the lock was missing and should have realized the danger of unseating the strongback, if the vehicle was raised. The trial judge found Di Mare was negligent in handling the draft, and that the libellant's injuries resulted from the negligence of both the respondent and the stevedoring company." (P. 607).

Clearly, the facts in the instant case show that there was no negligence on the part of the Jones foreman or any of its employees. Luehr was doing precisely what his job required him to be doing and was in the exact place he had to be to steady and guide the plane down to its final resting place. The accident simply resulted from the admitted negligence of the Government employee in dropping the plane upon Luehr.

Larsson v. Coastwise Line (9 C.C.A. 1950), 181 F. (2d) 6 had to do with an injury to a member of the crew caused by the negligence of a Chinese stevedore employed by the Republic of China. The injury was caused by the Chinese stevedore's throwing into operation a winch which libelant was oiling. There was

a shut-off valve which libelant could have used which would have avoided any possibility of accident while he was oiling the winch. The defense of the case was based upon the contention that "the injury to appellant resulted from his failure to use the simple safety precaution of cutting off the steam from the winch valve before proceeding to oil the winch" (page 8), based on a case with facts almost identical: *Shields v. United States,* 175 Fed. (2d) 743, certiorari denied, 338 U.S. 899. This Court held that the District Court was justified in finding that appellant knew about the shut-off valve on the winch and being a man of experience, must have known that by its use, his job of oiling the winch would be rendered absolutely safe (Page 9).

We fail to see how this authority in any way applies to the facts in the case at bar.

The quotation from 65 C.J.S. Section 122, page 732 has no application. It is agreed that if one having a choice between two courses of conduct pursues one that is dangerous rather than one which is safe where an ordinarily prudent person would not have so chosen, that he is guilty of contributory negligence. But such a situation does not prevail here. There was only one way in which Mr. Luehr could have steadied the plane and he was doing it in the usual, proper and customary manner, and he was in the position where he had to be at the time he was injured as the result of the negligence of the government employee.

Uzich v. E. & G. Brooke Iron Co. (D.C.E.D. Pa. 1947), 76 F. Supp. 788, is a case in which a steeplejack painter was denied recovery for an injury caused by his grasping a cable of a hoist in order to move around the cable. The motor at this instant was started by an employee of the defendant which caused the cable to be drawn rapidly upward, as a result of which the plaintiff's hand was drawn into a pulley. The Court properly held that "the testimony of the plaintiff himself, in the light of the undisputed facts, demonstrates beyond all doubt that he was contributorily negligent. Granting that he had to get on the other side of the cable in order to finish the job, and even provisionally agreeing with his counsel that that fact, might if there was no other way to do it, have justified his taking some risk (an extremely doubtful proposition), it is perfectly clear that the danger which he incurred and which resulted in the accident could have been entirely avoided without preventing his finishing his work. He needed only to have pulled himself up on the platform and let himself down on the other side of the steel arm. There was no necessity whatever for his attempting to pass around the cable on the outside." (Page 789).

To put it mildly, it is extremely farfetched to make the slightest comparison between the facts involving Luehr's accident and the situation presented in the Uzich case.

McKenney v. United States (D.C.N.D. Cal. S.D. 1951), 99 F. Supp. 121, is a case in which the libelant

was a junior third mate aboard respondent's vessel and was injured during a lifeboat drill when the bos'n tripped the releasing gear without orders to do so from the libelant, causing the boat to fall a distance of several feet into the water. The Court held that libelant's own negligence contributed to the cause of his injuries by reason of the fact that he, being in command of the emergency boat drill, negligently exposed himself by standing in a position where he had no business to be. The Court observed significantly that "although he contends that it was proper seamanship for him to have been standing in the stern thwart as the lifeboat was being lowered, there is compelling testimony to the contrary. The libelant was standing in an open and exposed position. Above the thwart there was only eight inches of freeboard up to the gunwales and his sole means of physical support consisted of the tiller, upon which he kept one hand. Yet the evidence discloses the fact that the tiller was not in a fixed position, but rather, that it was subject to a swinging, lateral movement. The libelant testified that he was too occupied, because of this position, to be able to make use of a man-line to try and save himself when the boat fell." (Pages 123, 124.) It can readily be seen that the situation in the *McKenney* case has no application to the problem involving Mr. Luehr's injuries.

The facts in the case of *Barbarino v. Stanhope S. S. Co.* (C.A. 2d 1945), 151 F. (2d) 553, are completely dissimilar and clearly distinguishable from the proven

facts in the *Luehr* case. The longshoreman in the *Barbarino* case was injured as the result of a breaking of a defective bolt which caused the boom to drop while it was being raised. The shipowner upon being sued impleaded the injured man's employer charging that the latter was negligent in the method of doing the work in that "too much strain was thrown on the bolt which caused it to break and to let down the boom".

The trial Court found "there was no evidence that the stevedore's employees were negligent in their management of the chain attached to the 'topping lift' and "that the boom fell because the bolt broke; that it broke because it was defective".

The Court of Appeals held: "We shall assume for argument that the boom fell because the bolt broke and that the bolt was defective; but we wish it understood that both these issues (one of the issues being immaterial here) will be open upon a new trial, and that we now decide only the question whether, in addition, the stevedore was negligent in the way in which it did the work" (p. 554). The Court held: "It was possible to avoid all danger at that time by merely warning the men to get out of the way. It is true that it was most uncommon for a boom to fall; but it was not unknown, and it would not have delayed the work for more than a few seconds to give the necessary warning and to see that it was obeyed. Considering that if it did fall, the men would be most gravely injured or killed, we cannot excuse the

failure to protect them by so simple a means. However, we will not hold the stevedore liable upon this record. The point which we are deciding was not very fully developed; and other evidence may come out at the new trial, which will put a new face upon it. We will merely reverse the decree exonerating the stevedore and remand the case for a new trial not only as to the shipowner, but as to it." (pp. 555-556).

As can be seen, there was actually no reason for the men to be under the boom, whereas Luehr had to be where he was in order to perform his work. Even so, the Court did not hold the stevedore company liable in the *Barbarino* case, but remanded the matter back to the trial Court for further evidence.

It is claimed that *Pan Am. Petroleum Co. v. Robins Dry Dock & R. Co.* (2d Circuit, 1922), 281 Fed. 97, at 109, is authority for the proposition that "the burden of proof is upon the stevedore to show why they did not use due care to avoid exposing its men to dangerous conditions" (Government's Brief, p. 25). The case cited has to do with the question of bailment and whether a repair contractor made customary tests with respect to electric telegraph equipment after the repairs had been made. The Court simply held that the contractor must show that the tests which the defendant did make were the customary ones or of equal effect in order to enable it to avoid liability for an accident resulting from the wrong connection of the telegraph. The Court held that "the burden was on the libelant to prove the contract and that

at the time the respondent delivered back the ship the telegraph was not properly adjusted and in good working condition. This burden was sustained. The presumption then arose that the respondent had not performed its contract, and was responsible for the condition in which the telegraph then was. The burden then rested on the defendant to overcome this presumption, and to establish by a preponderance of the evidence that it had fully performed its agreement and that the crossing of the wire and chain connection of the ship's telegraph was not due to its workmen's lack of skill, or careless conduct of the work, while the ship was in the respondent's possession" (p. 109).

In the case at bar, all that the Government did was to set up the stevedoring contract as a basis for seeking recovery-over from Jones. The Government most certainly did not prove that it suffered damage as a result of improper performance of the contract. Therefore, it is preposterous to say "that the burden of proof is upon the stevedore to show why they did not use due care to avoid exposing its men to dangerous conditions". Even if the burden of proof rested upon Jones, it was clearly met by overwhelming evidence that Luehr properly performed the work he was required to do and was in a position where he had to be in order to carry out the work assigned to the stevedore company by the Government.

CONCLUSION.

For the foregoing reasons, it is altogether clear that this appeal involves nothing more than an argument involving purely the facts at issue and there is no question of law for the Court to consider. The trial Court's findings of fact and conclusions of law are so overwhelmingly supported by substantial evidence proving conclusively that the accident was solely and proximately caused by the appellant's negligence, that it is respectfully submitted that the District Court's decree in favor of appellee Jones is lawful and should not be disturbed.

Dated, San Francisco, California,
May 11, 1953.

Respectfully submitted,
John H. Black,
Edward R. Kay,
Attorneys for Appellee
Jones Stevedoring Company.